NO. 21131

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Rein Neggo, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on February 9, 1966. The one-count indictment was brought under Title 18, United States Code, Section 1709, and charged that on or about January 27, 1966, in Los Angeles County, the appellant embezzled six letters, which letters had been entrusted to him and which had come into his possession intended to be conveyed by mail.

On March 14, 1966, the appellant pleaded not guilty. The

case proceeded to trial before the Honorable Francis C. Whelan on April 7, 1966. The court found appellant guilty on April 11, 1966.

Appellant's Notice of Appeal was timely filed [C. T. 45]. 1/

The jurisdiction of the District Court was based upon Title 18, U. S. C., Sections 1709, 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, U. S. C., Sections 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

The indictment was brought under Title 18, U. S. C., Section 1709, which provides in pertinent part as follows:

> "Whoever, being a . . . Postal Service employee, embezzles any letter, postal card . . . or mail or any article or thing contained therein intrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from

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1/ C. T. refers to Clerk's Transcript of Record.

any post office or station thereof established by authority of the Postmaster General; or steals, abstracts, or removes from any such letter, . . . or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

A. Was There Sufficient Probable Cause to Arrest Appellant?

B. Did Appellant Voluntarily Turn Over Evidence to the Postal Inspectors?

C. If the Postal Inspectors Did Conduct a Search, Was it Valid?

D. Was Appellant Denied His Right to Counsel Under the Sixth Amendment?

IV

STATEMENT OF FACTS

Prior to January 27, 1966, charting and analysis of missing mail by United States Postal Inspectors indicated that appellant might be embezzling mail which he should have delivered along his various delivery routes [R. T. 36, 39]. 2/

2/ R. T. refers to Reporter's Transcript of Record.

On the morning of January 27, 1966, a test delivery letter addressed to a fictitious address on Vantage Street was placed in appellant's carrier case [R. T. 137]. At approximately 9:00 A. M., appellant was observed by Inspector Johnson making deliveries on his route. At 9:10 A. M., Inspector Johnson went to the intersection of Bellingham and DeHougne and deposited two test collection letters in the mail box. At 9:20 A. M., appellant was observed making deliveries on Vantage Street where the test delivery letter had been addressed to the fictitious address [R. T. 112]. At approximately 10:30 A. M., Inspector Johnson opened the mail box at Bellingham and DeHougne and found that the test collection letters had been picked up [R. T. 113].

Thereafter, Inspector Johnson called George Clark at the North Hollywood Post Office and told him that the two test collection letters had been picked up by the appellant and that Clark should attempt to locate these letters when appellant returned with his collection mail [R. T. 114].

At approximately 1:30 P. M., Inspector Johnson met with Postal Inspector Jensen at the North Hollywood Post Office. At this time Johnson told Jensen of his surveillance activities and of the test letters [R. T. 114]. Thereafter the Post Office was searched for the test letters with a negative result [R. T. 115].

At approximately 4:20 P. M., Inspectors Jensen and Johnson approached appellant in the parking lot outside the North Hollywood Post Office. Inspector Jensen identified himself as a Postal Inspector and asked appellant if he could talk with him

concerning some mail that was under investigation [R. T. 143]. Appellant was asked about the test delivery letter that had been addressed to the fictitious address on Vantage Street. Appellant responded that the letter was with his mark-ups inside the building. At that point Inspector Johnson returned to the building and attempted to locate the letter. Approximately five minutes later Johnson returned and indicated that the letter could not be found.

Inspector Jensen then told appellant that "in view of the fact that the letter could not be found it appeared that we had what might become a criminal matter, and for that reason I informed him that he had a right to remain silent; anything he said could be used against him in court, and that he had a right to counsel by an attorney or any other person of his choosing" [R. T. 145].

Inspector Jensen then "told him that it appeared very strongly that he had possibly stolen a letter, or two or three, and I asked him concerning how much money he had with him, how much he had taken out of his personal money that morning, asked him if he had any money on him then, if I could see what he had.

"He then reached in his pocket and produced his wallet, and I looked through the wallet. While I was doing so both Mr. Johnson and I, I think almost simultaneously, asked if he had coin, and at that point he reached in his pocket and said, 'Yes,' and he handed Mr. Johnson some coins." [R. T. 145].

Mr. Johnson examined the coins and found a marked fifty-cent piece that had been inserted in one of the test letters which

had been prepared for collection by appellant that day [R. T. 146]. At this point appellant was told that he was under arrest [R. T. 147]. Inspector Jensen then asked appellant if he wouldn't like to tell the inspector about the rifled mail [R. T. 146]. Appellant then admitted that he had rifled the mail and further stated that the money was at his home [R. T. 148].

Mr. Jensen then asked appellant if he would object to taking the inspectors out to his house to obtain the money and other envelopes that he had embezzled [R. T. 147]. Appellant responded that he would go with the inspectors and they proceeded to drive to appellant's home [R. T. 147].

Upon arrival at appellant's home, Inspector Jensen and appellant walked to appellant's living quarters, a garage adjacent to the main house. Appellant opened the door of the garage and entered. Jensen entered after appellant and noticed some envelopes which he recognized on a dresser. Appellant reached over and handed two or three of the envelopes to Jensen. Appellant then initialled the envelopes and put the date on them for identification [R. T. 148]. At this point appellant asked the inspectors if they would discontinue the search and they complied [R. T. 149].

Inspector Jensen then asked appellant if he would retrieve the money which he had extracted from the letters. Appellant stated that he had the money in the main house and that he would get it. While the inspectors remained outside, appellant went inside the house by himself and returned with ten $1.00 bills [R. T. 149].

Inspector Jensen compared the serial numbers of the bills handed to him and three of the serial numbers corresponded to a previously recorded list of bills that had been placed inside test letters [R. T. 152].

Thereafter, appellant was taken back to the North Hollywood Post Office where they arrived at approximately 5:30 P. M. [R. T. 158]. After supplying the inspectors with some personal information, appellant was permitted to leave by himself upon his assurance that he would report to the United States Commissioner the next day voluntarily.

ARGUMENT

A.

THE ARREST OF APPELLANT WAS LAWFUL.

(1) There Was Sufficient Probable Cause to Arrest Appellant.

At the time that Inspectors Jensen and Johnson approached appellant outside of the post office in North Hollywood, they had been made aware of the following facts:

1. That charting and analysis of missing mail indicated that appellant might be embezzling mail which he should have delivered along his delivery route;

2. That three test letters had been prepared by Inspector Johnson on January 27, 1966, for handling by appellant in the

normal course of his duties that day;

3. That earlier that afternoon appellant had been seen delivering mail on Vantage Street where one of the test letters had been directed to a fictitious address;

4. That appellant had picked up the collection letters which had been deposited in the mail box at Bellingham and De Hougne;

5. That a check of the North Hollywood post office later that day failed to turn up the undeliverable test letter or the two test collection letters handled by appellant.

6. That appellant had in his possession a marked fifty cent coin that had been inserted inside a test letter earlier that day.

The above facts were clearly sufficient to warrant a reasonable, prudent man in believing that appellant had embezzled the test letters. As was stated by the Supreme Court in Beck v. Ohio, 379 U.S. 89, 91 (1964):

> "Whether the arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause . . . whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

(2) United States Postal Inspectors Have the Power to Make Arrests Under Federal Laws.

Title 39, United States Code, Section 3523(a)(2)(k) clearly indicates that Congress has granted to United States Postal Inspectors the power to effectuate the arrest of postal violators. Section 3523(a)(2)(k), provides as follows:

"(2) Duties and responsibilities --

"(k) In any criminal investigation, develops evidence, locates witnesses and suspects; apprehends and effects arrests of postal offenders, presents facts to United States attorney, and collaborates as required with Federal and State prosecutors in presentation before United States commissioner, grand jury, and trial court."

The Government has previously urged this point before this Court in Ward v. United States, 316 F. 2d 113, 118 (9 Cir. 1963). At that time Judge Barnes stated for the Court:

"We have not here passed upon the right of the postal inspectors, other than as private citizens, to make an arrest. The government urges they do. See 39 U. S. C. §3523(a)(2)(k), where it is implied that they have such authority. We do not meet that question, as it is here unnecessary."

The Government again urges this Court to consider the power of postal inspectors under §3523(a)(2)(k), and to hold that there is a federal grant of power authorizing United States Postal Inspectors to make arrests for violations of United States postal laws.

In the alternative, should this Court again decide not to pass upon the question of the scope of authority under §3523(a)(2)(k), Inspectors Johnson and Jensen clearly had the power under California law to make a citizen's arrest. Section 837 of the California Penal Code provides in part:

> "A private person may arrest another:
>
> " . . . .
>
> "3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

(3) There Was No Unreasonable Delay in Taking Appellant Before a United States Commissioner.

Appellant contends that there was a violation of Section 847 of the California Penal Code in that appellant was not immediately taken before a magistrate after his arrest. Assuming, arguendo, that California law applies, it is respectfully urged that appellant's rights were in no way violated. As appellant notes in his brief the arrest was made at approximately 4:20 P. M. The United States Commissioner's office in Los Angeles closes between

approximately 4:30 and 4:45 P. M. [R. T. 96]. If the Inspectors had attempted to take appellant to the United States Commissioner's office immediately after his arrest at 4:30, they would not have arrived until after 5:00 [R. T. 91]. Rather than take appellant from North Hollywood to downtown Los Angeles and hold him in custody overnight before he could be arraigned the next day, the Inspectors allowed appellant to go home overnight and voluntarily report back to the U. S. Marshal's office the next day.

People v. Martin, 225 Cal. App. 2d 91 (1964), cited by appellant is inapplicable to the case at bar. In the Martin case the District Court of Appeal reversed the conviction because of an illegal arrest. The reversal had nothing to do with a failure, if in fact there was one, to comply with the Section 847 requirement of taking a defendant directly to a magistrate. There was no discussion of how long the defendant was in custody prior to his being taken before a magistrate.

Finally, there appears to be no authority which holds that if a defendant is not arraigned promptly the preceding arrest is thereby invalidated. By analogy, the Mallory Rule in the Federal Courts [3/] which holds that statements made by a defendant after he has been held for an unreasonable period of time before being arraigned are inadmissible but that statements made before the detention has become unreasonable are admissible would seem to be applicable.

3/ Rule 5(a) Federal Rules of Criminal Procedure.

Mallory v. United States, 354 U. S. 449 (1957);

United States v. Mitchell, 322 U. S. 65 (1944).

The actions of the postal inspectors in this case in dealing with appellant, are certainly reasonable. Rather than attempt to take appellant before the U. S. Commissioner at an hour when the Commissioner would most likely not have been present and thereafter force him to spend the night in jail, they allowed him to go home and report the next day. Certainly this consideration and considerate treatment of a defendant is to be commended rather than censured.

B.

APPELLANT VOLUNTARILY TURNED OVER SUFFICIENT EVIDENCE UPON WHICH TO BASE HIS CONVICTION.

The Government contends that the chronology of events following appellant's initial confrontation with the postal inspectors as set forth in the statement of facts clearly demonstrates that appellant voluntarily turned over the marked fifty-cent piece which had been inserted in one of the test letters. 4/ After being thoroughly advised of his constitutional rights and of the nature of the

4/ In the alternative the government would submit that if the turnover of the marked coin is not held to be voluntary then clearly it was the result of a search incident to a valid arrest or substantially contemporaneous with a valid arrest.

Cipres v. United States, 343 F. 2d 95 (9 Cir. 1965).

investigation, appellant was asked if he had any money on him and if he would show it to the inspectors [R. T. 145]. Appellant then reached in his pocket and handed Inspector Johnson the marked coin [R. T. 145]. It is to be noted that no force was exerted other than the request that appellant show the inspectors his coins.

A case factually similar to the case at bar is Burke v. United States, 328 F. 2d 399, 403 (1 Cir. 1964). In Burke, one of the defendants was arrested at 2:30 A. M. Thereafter, at 9:30 the next morning the defendant was fully advised of his constitutional rights, including specific advice that the postal inspectors were investigating a mail robbery. The inspectors then asked the defendant if they could look at what he had in his pockets. The defendant then brought out a wallet and emptied it. The wallet contained two marked $20 bills. The 1st Circuit held that the arrest was illegal but that the two $20 bills should not have been suppressed because the turning over of the bills was "made deliberately and voluntarily on the basis of an intervening independent act of his own free will, and that they were not made under the compulsion of the illegal arrest." It is to be noted that in Burke the defendant had been in the psychologically coercive atmosphere of a jail for seven hours and yet his act was still deemed to be voluntary. How much less coercive are the circumstances in the case at bar where the defendant was in the presence of two postal inspectors for only a few minutes before he turned over the marked coin?

C.

APPELLANT CONSENTED TO THE SEARCH OF HIS LIVING QUARTERS.

Appellant argues that Title 39, United States Code, Section 903, effectively precludes a postal inspector from searching a dwelling house. However, Section 903 does not preclude a search of a dwelling house of a defendant who consents to such a search. A case in point is United States v. Haas, 109 F. Supp. 443 (D. C. Pa. 1952). In Haas, the District Court stated at page 444:

> "I can find no restriction in the quoted statute which declares illegal the voluntary act of a defendant in consenting to a postal inspector visiting his home and in voluntarily and actively giving to him certain mailable matter."

The court went on to say with facts almost identical to those at bar:

> "But defendant . . . voluntarily and willingly consented to the Postal Inspector entering his dwelling and, as the evidence further established defendant himself, on his own volition, made the mailable matter available to the Postal Inspector."

The question thus becomes, did the defendant Neggo consent to the search of his living quarters?

The fact that defendant Neggo had been placed under arrest prior to the seizure of the letters in his garage, does not preclude the possibility of his having consented to the search. As the Ninth Circuit has held in United States v. Page, 302 F. 2d 81 (9 Cir. 1963), at page 83:

> "We have no reservations as to the importance of maintaining the protection afforded to the citizen by the Fourth Amendment. . . .
>
> "Nevertheless, it has been long established that one can validly consent to a search, even though the consent be given while the defendant is in custody (citations omitted) . . . .
>
> "Whether such consent has been given is, in the first instance, a question of fact for the trial court.
>
> "Many decisions of the other Courts of Appeals sustain the trial court's finding that there was consent to a search, even though the consent was obtained under authority of the badge, or while defendant was under arrest. . . ."

Consent to a search or seizure constitutes a waiver of rights secured by the Fourth Amendment.

Amos v. United States, 225 U. S. 313 (1920);

United States v. Sclafani, 265 F. 2d 408 (2 Cir. 1959);

United States v. Dornblut, 261 F. 2d 949 (2 Cir. 1958).

That an individual can consent to a search of his home and acknowledge his guilt voluntarily cannot be denied. As was stated by Justice Frankfurter in United States v. Mitchell, supra at page 70 (1944):

> "Here there was no disclosure induced by illegal detention, no evidence was obtained in the violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgment by an accused of his guilt, and the subsequent viewing apparently of such spontaneous cooperation and concession of guilt."

In the case at bar defendant Neggo admitted to the Inspectors that the stolen mail and money were at his residence. He was asked if he would accompany the Inspectors to his residence to get the stolen property and he agreed to go with them. Upon arriving at Neggo's garage, Neggo himself opened the garage door for Inspector Jensen. Upon entering the converted garage, Inspector Jensen could see in plain view several letters lying on a dresser. The mere observation of what is freely exposed to view does not constitute a "search" within the meaning of the Fourth Amendment to the Constitution. Ellison v. United States, 206 F. 2d 476 (D. C. Cir. 1953).

Finally it seems quite clear that the appellant recognized

that the inspectors were engaged in a "consent search" of his living quarters. When the inspectors started searching through appellant's dresser he apparently decided that the search had gone far enough and he requested them to stop. The inspectors complied with appellant's request further indicating that they too intended to search only so long as appellant permitted the search.

D.

APPELLANT WAS NOT DENIED HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

Appellant appears to be arguing that he was deprived of his right to counsel because the inspectors did not advise him of his constitutional rights when they first approached him. In spite of the fact that the inspectors had sufficient probable cause to arrest appellant when they first approached him they were under no obligation to arrest him at that very moment. There is no constitutional right to be arrested.

Hoffa v. United States, 35 L. W. 4058, 4063 (Dec. 12, 1966).

The inspectors sought to give appellant one last chance to justify his actions. They asked him about the test delivery letter that had been addressed to the fictitious address on Vantage Street. Appellant responded that the letter was inside the post office. Immediately after determining that the letter was not inside the post office appellant was thoroughly advised of his constitutional

rights. Prior to this time appellant had made no incriminating statements. All admissions were made after the constitutional admonition was given.

Finally, the inspectors fully complied with the requirements of Escobedo v. Illinois, 378 U. S. 478 (1963). When appellant was first approached in the parking lot and commenced his conversation with the inspectors the ensuing conversation did not amount to a "custodial interrogation," within the meaning of Miranda v. Arizona, 384 U. S. 436, 444 (1966). The Supreme Court defined custodial interrogation in Miranda as follows:

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused." 5/

5/ It is to be noted that the Miranda case is not applicable to the case at bar and is only cited to assist in clarifying Escobedo v. Illinois, supra. Johnson v. New Jersey, 384 U. S. 719 (1966).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN